

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 38

WCC No. 2006-1551

DEAN L. KRATOVIL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

Notice of Appeal filed September 25, 2007

Summary: Respondent asks the Court to reconsider its decision in this matter because it alleges that it raised the issue of Petitioner's alleged failure to comply with the one-year claim filing period, and that this Court did not address Respondent's argument when deciding this case. Petitioner responds that Respondent's motion should be denied because Respondent never pled a statute of limitations affirmative defense.

Held: Pursuant to ARM 24.5.302(1)(a), the Court will not consider a statute of limitations defense unless it is listed in the contentions of the Response to Petition for Hearing, and Respondent did not do so in this case. Moreover, Respondent failed to set forth a statute of limitations defense in the Pretrial Order, which supercedes all pleadings. Therefore, Respondent's motion for reconsideration on the grounds that Petitioner allegedly failed to comply with the one-year claim filing period is denied.

¶ 1 Respondent Liberty Northwest Insurance Corporation moves the Court to reconsider its Findings of Fact, Conclusions of Law and Judgment entered July 17, 2007, in this matter.¹ Petitioner Dean L. Kratovil responds, arguing that the Court should not disturb its July 17, 2007, decision.

¶ 2 In support of its motion for reconsideration, Respondent alleges that Petitioner experienced symptoms while working for Wagner Mechanical which would have triggered the claim filing period in this matter, and that Petitioner thereby failed to comply with the

¹ *Kratovil v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 30.

one-year claim filing period set forth in § 39-72-403, MCA (2003). Respondent alleges that it raised the statute of limitations issue in its trial brief but the Court failed to address this argument in the Findings of Fact, Conclusions of Law and Judgment. Respondent argues the Court should consider this affirmative defense now and ultimately rule in Respondent's favor.

¶ 3 Petitioner responds that the one-year statute of limitations is an affirmative defense which Respondent neither pled in its Response to Petition for Hearing nor in the Pretrial Order. Petitioner cites to *Kelly v. Hartford Accident & Indemnity Co.*,² in which this Court, noting that a statute of limitations claim is an affirmative defense, held that an insurer can waive a statute of limitations defense either expressly or by not pleading it. In *Kelly*, this Court pointed out that, while Mont. R. Civ. P. 8(c) provides that a statute of limitations defense must be pled as an affirmative defense, even more to the point in workers' compensation cases:

[T]he Workers' Compensation Court has its own rules of procedure, its rules require a respondent to set out its contentions in its response, ARM 24.5.302(1)(a), hence the Court will not consider a statute of limitations defense if not listed in the contentions.³

¶ 4 As Petitioner correctly points out, Respondent did not set forth the statute of limitations defense as a contention in either its Response to Petition for Hearing or in the Pretrial Order.⁴ Respondent therefore waived this affirmative defense and its motion for reconsideration is denied.

ORDER

¶ 5 Respondent's motion for reconsideration is **DENIED**.

DATED in Helena, Montana, this 7th day of September, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: R. Russell Plath
Larry W. Jones

² *Kelly v. Hartford Accident & Indem. Co.*, 2000 MTWCC 50.

³ *Kelly*, n. 1.

⁴ See Docket Item Nos. 4 and 23.

Submitted: August 3, 2007